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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-504

J. J. ENOMOTO, et al.,
Appellants,

vs.

JAMES C. WRIGHT, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment granting an injunction issued by a three-judge District Court for the Northern District of California, entered September 30, 1976, and from the order of that court denying appellants' petition for rehearing or modification entered August 2, 1977.

The district court enjoined defendants (appellants herein) from making administrative transfers of state

prisoners out of the general prison population into maximum security housing units unless they followed the district court's prescriptions regarding notice, hearing, representation in certain cases, the right to present witnesses and written statement of reasons for the reclassification.

Appellants submit this statement to demonstrate that this Court has jurisdiction of this appeal, which presents substantial constitutional questions.[1]

OPINION BELOW

The Opinion of the United States District Court for the Northern District of California is unreported; a copy is appended hereto at pages 1-21.

JURISDICTION

Appellees,[2] invoking the jurisdiction of the district court under Title 28, United States Code sections 1343(4) and 2201 and Title 42, United States section 1983, brought this action for declaratory and injunctive relief to invalidate the classification procedures

[1]The appellants are Jiro J. Enomoto, Director of the Department of Corrections of the State of California; W. R. Stone, Superintendent of the California Training Facility at Soledad; Jacob Gunn, Warden of the California State Prison at Folsom; Robert Rees, Warden of the California State Prison at San Quentin; and L. N. Patterson, Superintendent of the Deuel Vocational Institution.

[2]Appellees named in the complaint are James C. Wright, Jerry Lee Pena, Roberto Pablo Salas, Michael S. Guile, Louis X. Richardson and Roberto Frias.

promulgated by the Director of the California Department of Corrections.

The action, filed December 27, 1973, was originally heard before a single district judge. Appellants moved for the convening of a three-judge district court pursuant to Title 28, United States Code section 2881, and on March 14, 1975, the three-judge court was convened.

The order of the court below enjoining enforcement of the regulations was entered September 30, 1976. The order denying appellants' petition for reconsideration or modification and a new trial was entered August 2, 1977. Notice of Appeal was filed August 5, 1977. Appendix pages 22-23.

Appellants presented an application for a stay of execution and enforcement of the judgment of the district court to Mr. Justice Rehnquist, who granted a stay and referred the application to the Court. The Court granted the stay on November 1, 1976. Appendix page 24.

The jurisdiction of this Court to review a decision of a three-judge court is conferred by Title 28, United States Code sections 1253 and 2101(b). *See, Younger v. Gilmore,* 404 U.S. 15 (1971); *United States v. Georgia Public Services Comm'n,* 371 U.S. 285, 287 (1963); *Florida Lime and Avocado Growers, Inc. v. Jacobsen,* 362 U.S. 73, 75-76 (1960).

REGULATIONS INVOLVED

The regulations governing administrative segregation of prisoners, which were invalidated by the district court, are set forth in the California Department of Corrections Inmate Classification Manual, Chapter 4, Article 3, sections 404-407, as follows:

Section 404. *General Procedures.*

(a) The committee will use the central file, information presented by the inmate, and any pertinent reports available.

(b) The inmate will make a personal appearance before the committee when feasible to participate fully and present a personal point of view or submit documents bearing on the proposed committee action. The reasons for any non-appearance will be documented.

(c) A CDC [California Department of Corrections] Form 128-G will be prepared and a copy given to the inmate in conformance with casework information validity and confidentiality procedures.

(d) Committee decisions will be reached through group discussions and agreement. Subcommittees will refer cases in which agreement cannot be reached to the next higher committee.

(e) The committee is to notify the inmate and relevant institution personnel of actions taken.

(f) The warden/superintendent can defer actions of the committee if the safety of the institution requires this.

Section 405. *Fairness Procedures.* Classification actions that result in a substantially adverse alteration of an inmate's condition of confinement will require the following procedures:

(a) Written notice of the proposed action and the reasons for it will be given to the inmate at least 24 hours before the classification hearing when it is known in advance that the proposal is for an action which is adverse to the inmate.

(b) A delay of at least 24 hours in the classification hearing will be granted upon the inmate's request when an unanticipated adverse classification action is proposed in the course of a classification hearing. The inmate will be given the required written statement and 24-hour notice.

(c) When the classification committee determines that an inmate is unable to prepare a defense against the proposed action, or the situation is complex, the matter will be referred to the inmate's caseworker or to an investigating officer for assistance.

(d) Emergency lockups and transfers will not require advance notice but inmates must have full opportunity to present their side at the classification meeting following the action. The reasons for the emergency action will be given to the inmate in writing as soon as possible after the action was taken and before his or her appearance at the hearing.

(e) The inmate may give up his or her right to 24-hour notice. Such a waiver will be documented.

Section 406. *Definitions of "Substantially Adverse Effect."*

(a) Actions having a substantially adverse effect on conditions of confinement are defined as follows:

(1) Transfer to another institution for the purpose of providing more restrictive custody.

(2) Increase in custody level.

(3) Involuntary assignment to a security housing unit by a classification committee.

(4) Involuntary removal from a program by classification committee action.

(b) These actions may be taken on a temporary emergency basis when necessary without prior notification.

(c) When taken at the reception center, these actions are not considered to have a substantially adverse effect on an inmate's condition of confinement.

Section 407. *Form of Notice.*

(a) Means of a notification of a proposed adverse classification action will be by copy of a CDC Form 128-B-1, which may be preprinted in part or entirely handwritten.

(b) The CDC Form 128-B can be initiated by any designated employee but would be prepared typically by the employee who is referring the inmate to the committee.

QUESTIONS PRESENTED

1. May a district court, contrary to *Montayne v. Haymes,* 427 U.S. 236 (1976) and *Meachum v. Fano,* 427 U.S. 215 (1976), require procedural due process in transfers of prisoners from the general prison population into security housing units for safety or administrative rather than disciplinary reasons?

2. May a district court over the objection of a party, base a summary judgment on facts which have been controverted?

STATEMENT OF THE CASE

A. Proceedings in the District Court

Plaintiffs, by a second amended complaint filed on July 11, 1974, brought this civil rights action as a class action on behalf of all adult male California state prisoners who are now or will be confined for more than 30 days in the maximum security housing units in the San Quentin, Folsom, Deuel and the Soledad institutions. In their first cause of action, the plaintiffs sought to enjoin enforcement of the rules and regulations of the Director of the California Department of Corrections and to obtain certain rights at classification hearings, as distinguished from disci-

plinary hearings.[3] The complaint sought prospective equitable relief only.

Appellants filed an answer denying plaintiffs' allegations on July 31, 1974. On September 27, 1974, the appellants filed an opposition to a motion of the plaintiffs for preliminary injunction and partial summary judgment. Attached to the opposition was an affidavit from Raymond K. Procunier, then acting Director of the California Department of Corrections, directed to the allegations of the complaint and the affidavits filed by the plaintiffs.[4] On February 11, 1976, the appellants filed a supplemental opposition to the motion for summary judgment with attached exhibits, consisting of Rules and Regulations of the California Department of Corrections which controverted plaintiffs' allegations.

On September 30, 1976, the district court issued a set of findings of fact and conclusions of law, and entered a partial summary judgment granting an injunction which provided, except for the rights to counsel and cross-examination, virtually every pro-

[3]A second cause of action in the complaint also demanded a declaratory judgment that the conditions of confinement in maximum security housing units constituted cruel and unusual punishment. The order of the court granting summary judgment purported not to address this cause of action. However, as will be set forth *infra*, the court actually made findings of fact which bear upon the second cause of action, although this part of the case has yet to be tried.

[4]One aspect of the discovery proceedings in this case reached this Court. In *Enomoto v. United States District Court*, 426 U.S. 944 (1976), this Court vacated, for further consideration, a judgment of the Court of Appeals for the Ninth Circuit denying the petition of these appellants, who were seeking relief from an order of the district court.

cedure the plaintiffs had sought in their amended complaint.

Appellants' motion to the district court for a stay of its order was denied on October 7, 1976. By its terms, the injunction was to take effect on October 13, 1976, but on that date Mr. Justice Rehnquist granted appellants' request for a stay of the injunction pending motion for reconsideration and appeal. As noted above, the stay was adopted by the Court on November 1, 1976.

On October 13, 1976, appellants filed in the district court their motion under Rules 52(b) and 59 of the Federal Rules of Civil Procedure for reconsideration, modification of findings, amendment of judgment and a new trial. With these motions appellants presented to the district court four affidavits directed to the court's findings of fact.

Appellants' motions were argued before the district court on August 2, 1977, and denied by order filed the same day.

Notice of appeal to this Court was filed August 5, 1977.

B. The District Court's Order

The judgment enjoined the appellants from removing prisoners from the general prison population to security housing units for safety and administrative reasons without first providing the following rights:

> "(1) written notice of the reasons in sufficient detail to enable the prisoner to prepare a response or defense, said notice to be furnished, ex-

cept in case of genuine emergency, before initial placement in the maximum security unit, but, in any event, not more than forty-eight (48) hours after such initial placement;

"(2) a fair hearing before one or more prison officials, said hearing to be held not less than seventy-two (72) hours after placement in the maximum security unit unless the inmate requests, in writing, additional time in which to prepare a defense;

"(3) representation by counsel-substitute when prison officials determine that the inmate is illiterate or that the complexity of the issues make it unlikely that he can collect and present the evidence necessary for an adequate comprehension of the case; determination and designation of counsel-substitute to be made at the time of the giving of the aforesaid notice, if counsel-substitute is not provided, the reasons must be stated in writing at the time of the hearing;

"(4) an opportunity to present witnesses and documentary evidence unless prison officials determine in good faith permitting such evidence will be unduly hazardous to institutional safety or correctional goals;

"(5) a written decision including reference to the evidence relied upon and the reasons for such confinement."

C. Facts

The affidavit of former Director of Corrections, Raymond K. Procunier, filed June 6, 1974, explained the necessity for administrative segregation. For example, the growth of inmate prison gangs had seri-

ously disrupted prison administration. These gangs were made up of inmates who grouped together to extort favors from non-members and to control illicit inmate activities such as trafficking in drugs and narcotics. On occasions they had engaged in assassinations and assaults.

To meet these problems and deal with other situations where inmates could not function in the general prison population, the Director personally took classification actions which resulted in inmates being placed in security housing units. This is no longer the case. At the time the district court issued its injunction, the responsibility for placing inmates in administrative segregation had been delegated to classification committees at the institutional level. Departmental review of these decisions was provided and procedures to ensure state concepts of fairness were instituted.

The classification process now used by the California Department of Corrections provides the basic vehicle for the administration of the prison system in California. Classification covers much more than administrative segregation. It includes job assignments, educational programs and selection of the degree of custody and the institution in which a prisoner is placed. The judgment of the district court interferes severely with classification procedure and the right and ability of the appellants to adjust those procedures in the light of their experience and institutional needs.

THE QUESTIONS ARE SUBSTANTIAL

The district court's ruling substantially impairs the discretionary powers of the State to administer its prison system. *See, Jones v. North Carolina Prisoners' Union, Inc.*, 53 L.Ed.2d 629, ... U.S. ..... (1977). The decision is contrary to *Montayne v. Haymes*, 427 U.S. 236 (1976) and *Meachum v. Fano*, 427 U.S. 215 (1976). Review in this Court is therefore necessary.

Moreover, in granting partial summary judgment, the district court assumed a state of facts which was contradicted by the showing made by appellants, both with respect to classification procedures and conditions of confinement in the security housing units of four California institutions. Review of the propriety of the district court's order granting partial summary judgment is necessary for this reason as well.

ARGUMENT

I

THE DISTRICT COURT ERRED WHEN IT REQUIRED PROCEDURAL DUE PROCESS IN TRANSFERS OF PRISONERS FROM THE GENERAL PRISON POPULATION INTO SECURITY HOUSING UNITS FOR SAFETY AND ADMINISTRATIVE RATHER THAN DISCIPLINARY REASONS

In *Montayne v. Haymes*, 427 U.S. 236 (1976) and *Meachum v. Fano*, 427 U.S. 215 (1976), this Court clearly held that, absent a state conferred right, a transfer of an inmate to more onerous confinement as a result of an administrative decision does not

bring the due process clause into play. *Montayne v. Haymes, supra* at 242-243; *Meachum v. Fano, supra* at 223-229.

No provision of California law vests any right in a prisoner to remain in any particular place or degree of custody. On the contrary, a number of statutes vest California prison officials, as did the Massachusetts statutes in *Meachum,* with broad discretion to transfer and classify prisoners. California Penal Code section 5068 provides in pertinent part:

> "The Director of Corrections shall cause each person committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of his life and the antecedents of the violation of law because of which he has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.
>
> "Upon the basis of the examination and study, the Director of Corrections shall classify prisoners and determine the prison in which the prisoner shall be confined."

* * * *

Regarding the transfer of prisoners, Penal Code section 5080 provides that "the Director of Corrections may transfer persons confined in one state prison institution or facility of the Department of Corrections to another." These sections are set forth in full in the appendix at pages 25-26.

These sections are strikingly similar to Title 18, United States Code section 4081, which this Court

recently construed in *Moody v. Daggett*, 429 U.S. 78 (1976). There this Court set forth the analysis which controls our case:

> ". . . We have rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right. In Meachum v. Fano, ... U.S. ....., 49 L Ed 2d 451, 96 S Ct 2532, for example, no due process protections were required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where that transfer visited a 'grievous loss' upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. Congress has given federal prison officials full discretion to control these conditions of confinement, 18 USC § 4081 [18 USCS § 4081], and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process." 429 U.S. at 88 n.9.

The district court invoked Title 15, California Administrative Code section 3330* as conferring a state law interest in not being confined in maximum security segregation. However, the provision in section 3330 for a statement of reasons is simply a pragmatic one, to inform management why a particular inmate is being placed in a particular classification as well as

*"§3330. General Policy. (a) Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken."

to provide for both inmate and staff a factual record for subsequent departmental review of the classification action. The fundamental fallacy in the district court's decision was its reliance on this administrative policy declaration to give a state prisoner a federally protected interest in the degree of his custody. If any interest at all is intended by this section, it relates to those people, other inmates and staff, who may be endangered if the inmate remains in the general prison population. At most, California prisoners have an "expectation" to remain in the same confinement, which this Court held is "too emphemeral and insubstantial" for due process protection. *Meachum, supra* at 228.

The district court declined to follow *Meachum* and *Montayne*, noting that this Court had "explicitly stated that the transfer decisions did not result in confinement in maximum security segregation." This, appellants submit, is far too narrow an interpretation of *Meachum* and *Montayne*. Indeed, though the transfer in *Montayne* was from one maximum security to another maximum security facility, in *Meachum*, the inmates were transferred from medium security to maximum security facilities.

The district court also attempted to distinguish *Meachum* and *Montayne* on the ground that in those cases the transfer was from one institution to another. But in *Lokey v. Richardson*, 427 U.S. 902 (1976), this Court vacated a judgment of the Court of Appeals for the Ninth Circuit which had granted a California prisoner a federally protected interest

in an intraprison transfer from minimum to maximum custody, remanding for consideration in the light of *Meachum* and *Montayne*.

In a final attempt to avoid the impact of *Meachum* and *Montayne*, the district court suggested that the transfers in those cases did not entail "segregated" or "disciplinary confinement". The references to segregated and disciplinary confinement are descriptive conclusions of the fact and cannot be the determinative factor of the cases. See *Montayne v. Haymes, supra* at 238; *Meachum v. Fano, supra* at 221-222.

It may well be that a prisoner will be found guilty of a violation of institutional rules, and sentenced to a specific term in punitive confinement. Later he can be placed in administrative segregation, but the decision to segregate him is made for essentially protective purposes, i.e., to protect others whom he might harm, or to keep him from other prisoners who might harm him. The classification decision is predictive rather than adjudicative; it looks to the prisoner's future conduct, not to his past violations. And a prisoner can be segregated without having been found guilty of a rule violation, just as he could be transferred to another institution.[6]

[6]Though confinement in administrative segregation is necessarily more restrictive than "mainline", it differs materially from disciplinary isolation. Segregated inmates continue to receive the regular prison diet, may have radios and television, participate in both diversionary, rehabilitative and religious programs, visit with both other inmates and outsiders and may take up to four hours outdoor exercise daily.

On the other hand, disciplinary isolations entail loss of canteen privileges, removal of books, radio and television, curtailment of visitors, both internal and external; meals though nutritious, do not include pastry or dessert, institutional programs are withdrawn and exercise is limited. Title 15 Cal.Admin Code §§ 3314, 3334 and 3336. Inmate Classification Manual, Art. 3, Chapter 6, § 611. These sections are set forth in full in the appendix at pages 26-30.

The district court has misunderstood the basic thrust of this Court's decisions. It should be directed to follow them.

II

THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE WERE GENUINE ISSUES OF FACT REMAINING TO BE TRIED

It is basic that on a motion for summary judgment, all inferences from the underlying facts contained in the materials before the court must be drawn in terms most favorable to the party opposing the motion. *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 467 (1962); 8 Wright and Miller, Federal Practice and Procedure, Civil Section 2716. Rule 56, Federal Rules of Civil Procedure authorizes summary judgment, "[o]nly . . . where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial . . . if they really have issues to try." *Sartor v. Arkansas Natural Gas, Corp.,* 321 U.S. 620, 627 (1944). Thus "the party moving for summary judgment has the burden of clearly establishing a lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently re-

garded." (Part 2, Moore's Federal Practice, § 56.15 [8], p. 56-642.)

Contrary to these principles, the district court granted summary judgment on findings of fact which in every instance were controverted by the appellants' allegations and exhibits. These findings of fact covered classification procedures and physical conditions of confinement within maximum security housing units.[7]

We submit that as to classification procedures and conditions of confinement as well, the lower court's findings of fact are erroneous.

A. Classification Procedures

The district court found that "defendants have consistently confined prisoners in maximum security segregation for administrative reasons without first giving them any meaningful hearing" and "some cases inmates have been confined in *solitary* [sic] for days —sometimes for weeks—before any meaningful hearing." The court's finding was erroneous in several respects.

The lower court first failed to distinguish punitive solitary confinement from administrative segregation, which has a different purpose. California makes this distinction (see footnote 6, *supra*) and at least one other federal court has recognized it. *Spain v. Procunier*, 408 F.Supp. 534, 554 (N.D.Cal. 1976).

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[7]It is ironic that the district court reached the question of conditions of confinement in dealing with the appellees' first cause of action, which related to classification procedure. Conditions of confinement formed the basis of appellees' second cause of action. This cause of action remains to be tried.

The court also erred by grounding its finding on affidavits, generally the least trustworthy basis for summary judgment (Vol. 6, Pt. 2, Moore's Federal Practice, section 56.15 [8] p. 56-642), that were stale in the sense that they recounted events which took place prior to the decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Following *Wolff*, California amended its classification procedures to provide a measure of fairness to prisoners subject to administrative segregation. Chapter 4, Article 3, §§ 404-407 of the Inmate Classification Manual, which was provided to the district court, specifically requires that an inmate is entitled to a twenty-four (24) hour advance notice prior to a transfer hearing, a personal appearance at the hearing, the opportunity to present documentary evidence, and a written statement of the facts and reasons for the result of the hearing.

The classification manual was relevant evidence of the procedures that the appellants were following when the injunction was issued. The presumption is that official duties are regularly performed. Cal.Evid. Code section 664. "The same reasons that warrant the use of presumptions at trial warrant their use at the summary judgment hearing." Moore's Federal Practice Vol. 6, Pt. 2, § 56.13[8], p. 56-641. There was no evidence before the district court that the appellees were then being denied meaningful classification hearings. And even if there were such evidence, it would no more than create a conflict with the evidence appellants presented; it could not warrant a summary judgment.

Furthermore, the district court's findings were erroneous. The court's statement on page seven of its opinion "defendants have made no showing that inmates confined in maximum security for administrative reasons are *in fact* given prior notice, hearing, and a written decision" is in error. The record before the district court showed that these protections were afforded to the inmates.[5]

B. Conditions of Confinement

The court's findings with respect to conditions of confinement are equally erroneous. The district court first found that "prisoners in the maximum security units are confined in cells approximately five feet wide by eight feet long." Appendix, pages 6-7. This finding was directly controverted by *Spain v. Procunier*, 408 F.Supp. 534 (N.D.Cal. 1976) at 541, and by the affidavits of Superintendents L. N. Patterson and George Sumner, as well as the affidavits of Wardens P. J. Morris and Robert Rees. These affidavits were before the district court on appellants' postjudgment motion.

Next, the district court found that "cells were without fresh air and daylight, both ventilation and lighting being poor. The lights in some cells are con-

[5]It appears from the court's opinion that the district court attempted to avoid the impact of appellants' classification rules by viewing them as ambiguous. Appendix, page 12, n.5. Federal intervention in state prison administration contravenes important considerations of comity and federalism. *Mayberry v. Maroney*, 418 F.Supp. 689 (W.D.Pa. 1976). If the district court viewed the rules as ambiguous, then it should have stayed its hand to allow California's courts to interpret them and pass on their constitutionality. *See also, Hicks v. Miranda*, 422 U.S. 322 (1975); *Younger v. Harris*, 401 U.S. 37 (1971).

trolled by guards." Appendix, page 7. This finding is also incorrect and was controverted by the affidavit of Raymond K. Procunier. This affidavit was before the court prior to the entry of judgment. This finding was also controverted by the affidavits of Wardens Morris and Rees and Superintendents Patterson and Sumner.

Next, the district court found that "it is difficult for prisoners to get needed medical attention." Appendix, page 7. This finding was also controverted by the affidavits of Wardens Morris and Rees and Superintendents Patterson and Sumner.

The court next found that the prisoners confined in security housing units "are allowed very limited exercise and virtually no contact with other prisoners." Appendix, page 7. This finding was controverted by the affidavit of Raymond K. Procunier at pages 7, 8, 11, 12, and 17 of the affidavit. This finding was also controverted by the findings of fact in *Spain v. Procunier, supra* at 542-543. This finding was further controverted by the affidavits of Superintendents Patterson and Sumner as well as the affidavits of Wardens Morris and Rees.

The district court next found that prisoners confined in maximum security housing units "cannot participate in vocational programs." Findings of Fact, page three. This finding is incorrect. While inmates confined in maximum security housing units necessarily are precluded from direct participation in prison shops, etc., these inmates are provided with many educational services. This finding of the district

court was controverted by the affidavit of Raymond K. Procunier as well as the affidavits of Superintendents Patterson and Sumner and of Wardens Morris and Rees.

Next, the court found that inmates confined in maximum security housing units are "denied those entertainment privileges provided for the general prison population." Appendix, page 7. This finding was incorrect and was directly controverted by the affidavit of Raymond K. Procunier. This finding was also directly controverted by the affidavits of Superintendents Patterson and Sumner, as well as the affidavits of Wardens Morris and Rees.

Finally, the court found that "parole is usually denied to them [inmates confined in maximum security housing units] until after release from maximum security segregation." Appendix, page 7. This finding is incorrect and was controverted by the affidavits of Superintendents Patterson and Sumner and of Wardens Morris and Rees.

The factual basis for the district court's decision seems to be that the conditions of confinement in maximum security housing units were so harsh that a due process hearing was required before a prisoner could be transferred there. Its decision is like building without a foundation. The facts upon which it relied were controverted by the appellants and could not support a summary judgment. For this reason as well, the decision of the district court must be reversed.

CONCLUSION

We respectfully submit that the judgment of the district court was erroneous. It presents substantial and constitutional questions and jurisdiction should be noted.

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September 29, 1977.

(Appendix Follows)

APPENDIX

Appendix

In the United States District Court
for the Northern District of California

No. C-73-1422 SAW

James C. Wright, Jerry Lee Pena, Roberto Pablo Salas, Michae' S. Guile, Louis X. Richardson, Roberto Frias, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Jiro J. Enomoto, Director of the Department of Corrections of the State of California; W. T. Stone, Superintendent of the California Training Facility at Soledad; Jacob Gunn, Warden of the California State Prison at Folsom; Robert Rees, Warden of the California State Prison at San Quentin; and L. N. Patterson, Superintendent of the Deuel Vocational Institution,

Defendants.

JUDGMENT

To comply with all relevant requirements of the Federal Rules of Civil Procedure relating to the form, content and separateness of Judgments and good cause appearing,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs' motion for summary judgment is granted;

It Is Further Ordered that defendants, their agents, servants, employees, and all persons in active concert and participation with them be and are hereby restrained and enjoined from continuing to cause, authorize or permit transfers of prisoners from the general prison population into maximum security housing units in order to segregate such prisoners for "administrative" reasons or purposes without first providing each such prisoner with the following procedural safeguards:

(1) written notice of the reasons in sufficient detail to enable the prisoner to prepare a response or defense, said notice to be furnished, except in case of genuine emergency, before initial placement in the maximum security unit, but, in any event, not more than forty-eight (48) hours after such initial placement;

(2) a fair hearing before one or more prison officials, said hearing to be held not less than seventy-two (72) hours after placement in the maximum security unit unless the inmate requests, in writing, additional time in which to prepare a defense;

(3) representation by counsel-substitute when prison officials determine that the inmate is illiterate or that the complexity of the issues makes it unlikely that he can collect and present the evidence necessary for an adequate comprehension of the case; determination and designation of counsel-substitute to be made at the time of the giving of the aforesaid notice; if counsel-substitute is not provided, the reasons must be stated in writing at the time of the hearing;

(4) an opportunity to present witnesses and documentary evidence unless prison officials determine in good faith that permitting such evidence will be unduly hazardous to institutional safety or correctional goals;

(5) a written decision including references to the evidence relied upon and the reasons for such confinement.

In the event of a continuing emergency, such as a prolonged riot, which, in the good faith determination of prison officials, prevents notice and hearing as required above, said notice and hearing must be provided as soon as is practical.

It Is Further Ordered that plaintiffs and those members of sub-class (3) involuntarily confined for administrative reasons be immediately accorded the procedural safeguards hereinabove specified.

It Is Further Ordered that within ten (10) days hereafter, defendants (1) provide a copy of this order to each prisoner confined in maximum security for administrative reasons and (2) post copies where they may be readily seen by all other members of the class.

Dated: September 30, 1976.

Stanley A. Weigel
Judge

In the United States District Court
for the Northern District of California

No. C-73-1422 SAW

James C. Wright, Jerry Lee Pena, Roberto Pablo Salas, Michael S. Guile, Louis X. Richardson, Roberto Frias, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Jiro J. Enomoto, Director of the Department of Corrections of the State of California; W. T. Stone, Superintendent of the California Training Facility at Soledad; Jacob Gunn, Warden of the California State Prison at Folsom; Robert Rees, Warden of the California State Prison at San Quentin; and L. N. Patterson, Superintendent of the Deuel Vocational Institution,

Defendants.

Before: DUNIWAY, Circuit Judge, and
WOLLENBERG and WEIGEL, District Judges*

WEIGEL, J.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

*Honorable Ben C. Duniway, United States Circuit Judge for the Ninth Circuit, Honorable Albert C. Wollenberg, Senior United States District Judge and Honorable Stanley A. Weigel, United States District Judge, Southern District of California, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit.

This action was brought by plaintiffs on behalf of themselves and the class of all male prisoners confined or subject to confinement in maximum security at four State of California prisons located, respectively, at San Quentin, Folsom, Soledad and Tracy. Defendants are the wardens of the prisons and the director of the Department of Corrections.[1] The class, certified on February 25, 1976, is divided into three sub-classes: (1) All prisoners confined and/or subject to being confined in maximum security units at the four institutions as a result of disciplinary procedures; (2) all prisoners so confined who have knowingly and voluntarily requested confinement in such units; and (3) all prisoners confined in such units or subject to being so confined who are not included in sub-class (1) or (2). This last sub-class includes those confined for so-called "administrative" reasons.

The complaint alleges two causes of action. The first challenges the procedures resulting in confinement of inmates in maximum security units for "administrative" reasons. The second challenges conditions of confinement in the units.

By the motions now before us, plaintiffs seek summary judgment and injunctive relief only on the first cause of action. They claim that defendants' applicable rules, practices and procedures violate the due

[1]At the time the suit was filed, Raymond K. Procunier was the Director of Corrections and Louis S. Nelson was the Warden of the California State Prison at San Quentin. The former has since been replaced by Jiro J. Enomoto and the latter by Robert Rees. Under Fed. R. Civ. P. 25(d), they have been automatically substituted.

process clause of the Fourteenth Amendment.[2]

Plaintiffs claim that defendants act arbitrarily in purporting to conform to their own standards for administrative segregation, *i.e.*, that the inmate constitutes a danger to himself, or to other inmates, or to the staff.[3] The main thrust of plaintiffs' claims lies in their allegations that, in purporting to apply the relevant standards, defendants have denied plaintiffs: Written notice of the charges against them; an opportunity to present witnesses and documentary evidence; an opportunity to confront and cross-examine adverse witnesses; representation by counsel or counsel-substitute; and a written decision stating reasons for confinement in maximum security units. Plaintiffs seek injunctive relief requiring defendants to provide these procedural protections. They also seek expungement from their prison records of any reference to their confinement in maximum security units unless the decision leading to the confinement was made in accordance with the demanded procedures.

Plaintiffs have filed forty-seven affidavits from prisoners confined in maximum security segregation for administrative reasons. Those affidavits, *which are not contradicted,* establish the facts we now summarize.

A. *The conditions in maximum security units*

Prisoners in the maximum security units are confined in cells approximately five feet wide by eight

[2]The rules are formal orders of statewide application. Hence the need for a three-judge court in this case. 28 U.S.C. §2281 (1970); Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968).

Plaintiffs also allege that the rules violate Art. I, §§8 and 13 of the California Constitution. We do not reach that question.

[3]We emphasize that the facts before us involve only transfer of prisoners from the general prison population to maximum security units for *administrative reasons* and confine our decision accordingly.

feet long. The cells are without fresh air or daylight, both ventilation and lighting being poor. The lights in some cells are controlled by guards. It is difficult for prisoners to get needed medical attention. They must eat in their cells or not at all. They are allowed very limited exercise and virtually no contact with other prisoners. They cannot participate in vocational programs. They are denied those entertainment privileges provided for the general prison population. Parole is usually denied to them until after release from maximum security segregation.[4]

It is clear, then, that a prisoner confined in a maximum security unit suffers a loss of liberty much more severe than that experienced by a prisoner in the general prison population. *See Spain v. Procunier,* 408 F. Supp. 534 (N.D. Cal. 1976); *Clutchette v. Procunier,* 328 F. Supp. 767 (N.D. Cal. 1971, *aff'd,* 497 F.2d 809 (9th Cir. 1974), *modified,* 510 F.2d 613 (1975), *rev'd in part on other grounds,* 44 U.S.L.W. 4487 (April 20, 1976).

B. *The procedures used in ordering administrative segregation*

A so-called Classification Committee in each institution is empowered to order prisoners transferred from the general prison population to maximum security for administrative reasons. The Committee is composed of the warden, two associate wardens, the chief psychiatrist, a program administrator and a

[4]As one of the affidavits before us aptly characterizes it, inmates confined in maximum security are "warehoused". The manner of confinement may cause permanent psychological, if not, indeed, physical damage. If prolonged, it may even destroy the capacity of prisoners to lead a normal life after release. Affidavit of Bernard L. Diamond.

correctional counselor. Any three members constitute a quorum. The warden has discretion to designate other members of the staff as permanent or temporary members. Defendants' Exhibit A, Department of Corrections Rules and Regulations, Ch. 4, filed Feb. 1, 1976.

Defendants have consistently confined prisoners in maximum security segregation for administrative reasons without first giving them any meaningful hearing. Typically, the inmate is transferred to a maximum security unit before he is brought before the Classification Committee. In many cases, prisoners have been confined in solitary for days—sometimes for weeks—before any hearing. In some cases, inmates have been so confined and not told the reasons, even informally, until appearance before the Committee.

The vagaries and irregularities of defendants' practices are illustrated by the following excerpts from affidavits submitted by plaintiffs (all uncontradicted as noted earlier).

> On November 7, 1973, I was taken to North Segregation Unit . . . where I remained confined for about 2½ months.
>
> . . . .
>
> I have never been involved in violence or convicted of any crimes during my 32 months at San Quentin. . . .
>
> On November 7, 1973, I was taken from my cell in the Mainline to the North Segregation Unit for no reason at all. No formal charges were brought against me. I, along with other Black Muslims, who were also taken from the Mainline, was told that I was being confined . . . for "institutional convenience." We were told

> that we were becoming too militant: that we spent too much time in the yard by ourselves. . . .
>
> On November 14th, one week after being sent to [maximum security], I met with the Classification Committee. . . . I was . . . told . . . that they would lock me up "until they figured out what to do with us". . . . I was not told anything more specific. The meeting with the Committee lasted about five minutes. . . .
>
> Affidavit of William E. X. Richmond, Plaintiffs' Exhibit 19.
>
> * * * * * * *
>
> In December of 1972 I was removed from an honor wing . . . and placed in [maximum security]. I was told by a two-man classification committee that I was a threat to other inmates and to myself, that they'd gone through my jacket [*i.e.* the affiant's prison records] and from my past record I appeared to be a threat. However, I was given nothing in writing. . . .
>
> About mid-January of 1974, I went to a committee meeting which lasted about five minutes during which time I was simply told that I was a threat to inmates and would remain in maximum security. At that time, I had had over a year clean time, that is, I had no prison disciplinary reports for that period of time. During this hearing, I had no opportunity to present any witnesses or any evidence in my own behalf, nor was I informed of what evidence the committee was using, except their telling me that it was in my jacket.
>
> Affidavit of Stanley Baliel, Plaintiffs' Exhibit 39.
>
> * * * * * * *

On January 19, 1973, I was taken before the main disciplinary committee for a hearing under the allegation of possession and control of a contraband file. . . .

On January 28, 1973, I was taken before the Institution Classification Committee. . . . [The Committee] advised me that I was exonerated of implication or responsibility in the contraband file. . . .

[The Committee] nevertheless told me it was 'the desire of the committee' to further retain me in Security Housing Unit. When I inquired as to *why*; [sic] I was being retained in punitive segregation when, by the committee's own admission, I had no disciplinary infractions and had not exhibited any behavioral patters [sic] warranting or justifying punitive segregation. [I was told] that I was considered as an "influencial [sic] member of the Mexican Prison Community" and was "believed to have leadership qualities."

Affidavit of Roberto Pablo Salas, Plaintiffs' Exhibit 2 (emphasis in original).

* * * * * * *

While at Vacaville I was elected Chairman of Empleo, a Mexican-American organization aiming to achieve unity among Chicanos. After my transfer to Soledad I joined a Latin American culture group called C.A.U.S.A. . . .

. . . .

I was in the mainline at Soledad until September of 1972 when after two killings occurred, Soledad was locked down. Along with about fifty other Chicanos, I was taken to . . . the isolation wing. . . . I was never taken before any committee to answer any formal charges. The only

reason given to me was that I was suspected of being a leader in Nuestra Familia.

. . . I was accused . . . of being the "Godfather" of that organization as reported by "reliable sources." I asked to confront my accusers but they were never brought forward. I am not now, and have never been, associated with Nuestra Familia.

Periodically, my classification would be reviewed. I was told that the only way I could get out of [maximum security] would be to prove that I was not affiliated with Nuestra Familia though I was never told how I should go about proving this. . . . In fact, [the Warden] even told me that he was aware that I was not a leader in Nuestra Familia but he still felt that I should be in [maximum security] because I was "influential" with The Family.

Affidavit of Roberto Frias, Plaintiffs' Exhibit 5.

At the Classification Committee hearing, the inmate may be given a chance to respond to the charges then revealed to him for the first time. However, he is given no opportunity to call witnesses on his behalf nor to confront those who have given information against him. In fact, the sources and even the nature of the information are often not made known to him. Under these circumstances, all the inmate can do is make an unsupported denial of the charges against him. And no written reasons for the Committee's decision are furnished.

In the face of the foregoing, the most that defendants have shown is their rules and regulations pur-

port to require that "when possible" prior notice be given of the proposed transfer into maximum security, a hearing be provided and a written statement of the outcome be given the inmate.[5] There is no definition of "when possible". Indeed, there is none as to what is or constitutes a "hearing". The rules do not require or permit the inmate to have counsel or counsel-substitute, nor do they permit him to call witnesses or confront adverse witnesses.[6] Defendants have made no showing that inmates confined in maximum security for administrative reasons are *in fact* given prior notice, a hearing, and a written decision.

C. *The requirements of due process*

To decide whether a state must afford procedural protections against arbitrary state action, the threshold question is whether a property or liberty interest protected by the Fifth and Fourteenth Amendments is at stake. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Morrissey v. Brewer,* 408 U.S. 471, 481-82 (1972).

---

[5]They do not require that a hearing be granted. They simply describe the procedures to be followed if a hearing takes place. They are drafted in such a manner as to make it extremely difficult to determine which rules are presently in effect and what procedures must be followed. At oral argument, even counsel for defendants were unable to inform the court as to these matters.

[6]Chapter 4, Article 9, of the rules and regulations of the Director of Corrections provides:

> Classification actions that result in a substantial adverse effect on an inmate's conditions of confinement will require when possible advance written notice of the proposed action, a hearing, and a written statement of the findings.

We note again that neither "hearing" nor the words "when possible" are defined.

In recent cases dealing with due process claims by prisoners, the courts have recognized that

> though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. . . . [Prisoners] may not be deprived of life, liberty, or property without due process of law.

Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

When a prisoner is transferred from the general prison population to the grossly more onerous conditions of maximum security, be it for disciplinary or for administrative reasons, there is severe impairment of the residuum of liberty which he retains as a prisoner—an impairment which triggers the requirement for due process safeguards. *Cluchette v. Procunier, supra; United States ex rel. Miller v. Twomey,* 479 F.2d 701 (7th Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974); *Allen v. Nelson,* 354 F. Supp. 505 (N.D. Cal. 1973), *aff'd,* 484 F.2d 960 (9th Cir. 1973).

Defendants contend that these cases are no longer valid in light of two cases recently decided by the Supreme Court, *viz., Meachum v. Fano,* 44 U.S.L.W. 5053 (June 25, 1976) and *Montanye v. Haymes,* 44 U.S.L.W. 5051 (June 25, 1976). These decisions hold that a transfer of a prisoner from one institution to another does not impinge on a liberty interest protected by due process unless state law or practice makes such a transfer depend on proof of serious

misconduct or the occurrence of other specified events. While the holdings do apply even if conditions in the prison to which the inmate is transferred are more onerous than those prevailing in the prison where he was previously confined, defendants err in claiming these decisions control the questions presented to us in this case.

Meachum and *Montanye* hold only that some discretionary decisions of prison officials, such as the decision to transfer a prisoner to another institution, do not result in such a substantial invasion of a prisoner's liberty interest as to trigger the need for due process protections. The Supreme Court explicitly stated that the transfer decisions did not result in confinement in maximum security segregation. *Meachum v. Fano, supra,* 44 U.S.L.W. at 5055; *Montanye v. Haymes, id.* at 5051. Contrary to defendants' contention, these opinions do not hold that a prisoner may be confined in maximum security segregation "for whatever reason or for no reason at all", regardless of the extent of the deprivation caused by such segregation.

> [Imposition of "solitary" confinement] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here . . . there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.

Wolff v. McDonnell, supra, 418 U.S. at 571-72, n. 19.

Moreover, *Meachum* and *Montanye* hold that if the state itself imposes limits on its discretion by conditioning decisions such as prison transfers on a specific standard being met, the state creates a liberty interest which is protected by due process. This is true whether the limits which the state imposes on itself stem from statute, rule, or regulation. *Meachum v. Fano, supra,* 44 U.S.L.W. at 5057.

Here, defendants have limited the discretion of the classification committees by statewide regulations which define the circumstances under which an inmate may be confined in maximum security for administrative reasons. In its most recent version, Chapter 4, Article 6 of the rules and regulations of the Director of Corrections provides:

> §3330. General Policy. (a) Inmates must be segregated from others when it is *reasonably* believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. *The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken.* (Emphasis added.)[7]

[7]This version of the regulation became effective on July 1, 1976. The prior version read:

> Inmates must be segregated from others when it becomes evident that they are a menace to themselves or others, or to property or to the morale of the general population. Inmates may be segregated for medical, psychiatric, disciplinary or administrative reasons. . . . The reason for segregation of an inmate must be clearly documented by the official ordering the action, at the time such action is taken. Such action requires full classification committee review at the next regular meeting.

Thus, the inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum security segregation unless he is found, for clearly documented reasons, to come within the standard set by the rules. We now consider what procedures are required.

The Supreme Court has dealt with that question when state prison inmates are deprived of significant privileges or confined in maximum security for *disciplinary* reasons. *Enomoto v. Clutchette,* 44 U.S.L.W. 4487 (April 20, 1976); *Wolff v. McDonnell,* 418 U.S. 539 (1974). In such cases, *Wolff* establishes that the prisoner must be given: An opportunity to appear before the decision-making body; written notice of the charge against him in advance of the hearing; an opportunity to present witnesses and documentary evidence "when [it] will not be hazardous to institutional safety or correctional goals"; a written statement of the reasons for the decision to punish him and of the evidence on which it is based; and, if he is illiterate or if the issues are complex, counsel-substitute (either a fellow inmate or a member of the prison staff) to help prepare his defense.

Defendants have made no showing that prison administration or safety will be jeopardized if defendants are required to accord plaintiffs at least the minimal protections called for by *Wolff* in the case of disciplinary sanctions. These minimal protections are essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the security of the institution and thereby

to avoid subjection to the severe deprivations of confinement in maximum security. Indeed, defendants' interest in preventing prison violence may be well served by making fair procedures requisite to maximum security confinement. Plaintiffs have placed before us expert testimony—not contradicted—indicating that implementation of fair procedures decreases tensions in prisons and eases the work of prison administrators. Affidavits of John Boone, former Commissioner of Convictions for Massachusetts, and David Fogel, Executive Director of the Illinois Law Enforcement Commission, attached to Plaintiffs' Supplemental Response re Motion for Preliminary Injunction and Partial Summary Judgment filed February 18, 1976.

In holding that plaintiffs may not be confined in maximum security for *administrative* reasons unless they have been provided, minimally, with the safeguards required for such confinement for *disciplinary* reasons, we do not reach the question as to whether even more procedural protections must be required for such confinement for administrative reasons. The deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge. The latter is for a definite term, generally for a maximum of ten days. In contrast, administrative segregation is for an indefinite period—the prisoner may be confined for months, even years, without hope of release. The charges at a disciplinary hearing are definite and narrow. The inmate is accused of violating a prison

rule. In contrast, as is evidenced by plaintiffs' exhibits, the charges at a hearing resulting in administrative confinement tend to be vague, and are frequently based on mere rumor, suspicion, or conjecture. In this connection we deem it appropriate to note that the circumstances and issues involved in decisions leading to administrative segregation may well, upon a proper showing, demonstrate the necessity for additional procedures to make hearings adequate.[5] *See generally* Tobriner & Cohen, *How Much Process is "Due"? Parolees and Prisoners,* 25 HASTINGS L.J. 801 (1974); *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973); N. MORRIS, THE FUTURE OF IMPRISONMENT 30-34, 62-73 (1974).

However, on the basis of the record before us in this case, we are unable to find that all the relief sought by plaintiffs is constitutionally required insofar as it exceeds that required by *Wolff*. There is not sufficient evidence now before us in this case to show the effect such extensive procedural requirements would have on the administration of California prisons. Without such evidence, we are unable to determine with sufficient certainty "the precise nature of the government function involved as well as the private interest that has been affected by govern-

[5]Defendants' rules provide that in disciplinary cases resulting in confinement in maximum security, the disciplinary committee must carefully evaluate information provided by secret informants, and must have evidence corroborating such information if it is relied upon. Those rules also require that in such cases a summary of the evidence obtained from the confidential source be given to the inmate if to do so will not reveal the source's identity. No such rules pertain to cases resulting in maximum security segregation for administrative reasons.

mental action." *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961).

Should it appear that the relief we grant today fails adequately to correct defendants' arbitrary practices in imposing administrative segregation, plaintiffs are not foreclosed from seeking further relief consistent with valid correctional goals and prison safety requirements.

We decline to order that defendants expunge references in prison records to findings that plaintiffs are not suited to be housed in the general prison population. We do not believe that it would be appropriate to require expungement in light of the burden it would place on prison officials. *Wolff v. McDonnell, supra,* 418 U.S. at 573-74.

In the light of all the foregoing,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs' motion for summary judgment is granted;

It Is Further Ordered that defendants, their agents, servants, employees, and all persons in active concert and participation with them be and are hereby restrained and enjoined from continuing to cause, authorize or permit transfers of prisoners from the general prison population into maximum security housing units in order to segregate such prisoners for "administrative" reasons or purposes without first providing each such prisoner with the following procedural safeguards:

(1) written notice of the reasons in sufficient detail to enable the prisoner to prepare a response

or defense, said notice to be furnished, except in case of genuine emergency, before initial placement in the maximum security unit, but, in any event, not more than forty-eight (48) hours after such initial placement;

(2) a fair hearing before one or more prison officials, said hearing to be held not less than seventy-two (72) hours after placement in the maximum security unit unless the inmate requests, in writing, additional time in which to prepare a defense;

(3) representation by counsel-substitute when prison officials determine that the inmate is illiterate or that the complexity of the issues makes it unlikely that he can collect and present the evidence necessary for an adequate comprehension of the case; determination and designation of counsel-substitute to be made at the time of the giving of the aforesaid notice; if counsel-substitute is not provided, the reasons must be stated in writing at the time of the hearing;

(4) an opportunity to present witnesses and documentary evidence unless prison officials determine in good faith that permitting such evidence will be unduly hazardous to institutional safety or correctional goals;

(5) a written decision including references to the evidence relied upon and the reasons for such confinement.

In the event of a continuing emergency, such as a prolonged riot, which, in the good faith determination of prison officials, prevents notice and hearing as required above, said notice and hearing must be provided as soon as is practical.

It Is Further Ordered that plaintiffs and those members of sub-class (3) involuntarily confined for administrative reasons be immediately accorded the procedural safeguards hereinabove specified.

It Is Further Ordered that within ten (10) days hereafter, defendants (1) provide a copy of this order to each prisoner confined in maximum security for administrative reasons and (2) post copies where they may be readily seen by all other members of the class.

Dated: September 30, 1976

/s/ Ben C. Duniway
/s/ Albert C. Wollenberg
/s/ Stanley A. Weigel

United States District Court
Northern District of California

No. C-73-1422 SAW
(Three-Judge Court)

James C. Wright, Jerry Lee Pena, Roberto Pablo Salas, Michael S. Guile, Louis X. Richardson, Roberto Frias, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Jiro J. Enomoto, Director of the Department of Corrections of the State of California; W. T. Stone, Superintendent of the California Training Facility at Soledad; Jacob Gunn, Warden of the California State Prison at Folsom; Robert Rees, Warden of the California State Prison at San Quentin; and L. N. Patterson, Superintendent of the Deuel Vocational Institution,

Defendants.

[Filed Aug. 5, 1977]

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice Is Hereby Given that J. J. Enomoto, L. N. Patterson, George Sumner, and P. J. Morris, the defendants above-named, hereby appeal to the Supreme Court of the United States from the final order granting plaintiffs' motion for partial summary judgment, entered in this action on September 30, 1976,

and from the order denying defendants' motion for reconsideration or modification of findings and amendment of judgment accordingly and from defendants' motion for a new trial, entered in this action on August 2, 1977.

This appeal is taken pursuant to Title 28, United States Code section 1253.

Dated: August 5, 1977

Evelle J. Younger,
Attorney General of the State of California,

Jack R. Winkler,
Chief Assistant Attorney General—
Criminal Division,

Edward P. O'Brien,
Assistant Attorney General,

Robert R. Granucci,
Deputy Attorney General,

Jerome C. Utz,
Deputy Attorney General,

/s/ Michael Buzzell,

Michael Buzzell,
Deputy Attorney General,

Attorneys for Defendants.

MB:svc

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

November 1, 1976

Jerome C. Utz, Esq.
Deputy Attorney General of California
Dept. of Justice
State Bldg.
San Francisco, CA 94102

RE: J. J. Enomoto, Director of Corrections of California, et al. v. James C. Wright, et al.
A-301 (USDC ND Civil No. C-73-1422 SAW)

Dear Sir:

The Court today entered the following order in the above-entitled cause:

> The application for stay of execution and enforcement of the judgment of the United States District Court for the Northern District of California (Civil No. C-73-1422 SAW), entered September 30, 1976, presented to Mr. Justice Rehnquist and by him referred to the Court, is granted.

Very truly yours,

cc: B. E. Bergesen, III, Esq.
Youth Law Center
693 Mission St., 2d Fl.
San Francisco, CA 94105

Michael Rodak, Jr., Clerk
By Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

Wm. L. Whittaker—Clerk
USDC ND CALIF.
PO Box 36060
San Francisco, CA 94102

Emil E. Melfi, Jr., Esq.—Clerk
USCA 9
PO Box 547
San Francisco, CA 94101
[USCA 9 #76-3176]

California Penal Code

§ 5068. The Director of Corrections shall cause each person committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of his life and the antecedents of the violation of law because of which he has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.

Upon the basis of the examination and study, the Director of Corrections shall classify prisoners and determine the prison in which the prisoners shall be confined.

When diagnostic study of any inmate committed under subdivision (b) of Section 1168 so indicates, the director shall cause a psychiatric or psychological report to be prepared for the Community Release Board prior to release of such inmate.

Before the release of any inmate committed under subdivision (b) of Section 1168, the director shall provide the Community Release Board with a written evaluation of the prisoner.

§ 5080. *Transfer of prisoners*

The Director of Corrections may transfer persons confined in one state prison institution or facility of the Department of Corrections to another. The * * * Community Release Board may request the Director of Corrections to transfer an inmate who is under its * * *parole-granting jurisdiction if, after review of the case history in the course of routine procedures,

such transfer is deemed advisable for the further diagnosis, and treatment of the inmate. The director shall as soon as practicable comply with such request, provided that, if facilities are not available he shall report that fact to the Community Release Board and shall make the transfer as soon as facilities become available, provided further, that if in the opinion of the Director of Corrections such transfer would endanger security he may report that fact to the Community Release Board and refuse to make such transfer.

When transferring an inmate from one state prison, institution, or facility of the Department of Corrections to another, the director may, as necessary or convenient, authorize transportation via a route that lies partly outside this state.

California Administrative Code, Title 15

3314. *Administrative Rule Violations.* (a) Inmate misbehavior which falls into this classification of rule violation is usually of a minor nature, presenting no present threat to the physical safety of persons nor to institution security. Specifically excluded from the classification of *Administrative* violations are felony offenses requiring referral to the district attorney for possible criminal prosecution, and misbehavior for which an inmate may be denied good conduct or participation credits. General guidelines for *Administrative* rule violations include but are not limited to:

(1) Minor violations of rules and procedures.

(2) Minor acts of disobedience, disrespect or disregard for the rights of others.

(3) Vulgarity and obscenity.

(4) Possession of petty property, material, items or substances not authorized by the institution's approved property list, or of property in excess of authorized limits.

(5) Minor gambling activity.

(6) Minor destruction or misuse of state property.

(7) Petty theft or unauthorized acquisition or exchange of personal or state property.

(8) Out-of-bounds not related to a *Serious* violation.

(9) Misuse of telephones, not related to institution security.

(10) Minor mail or visiting violations.

(11) Minor work performance violations.

(12) Minor program attendance and participation violations.

(13) Misuse of food.

(14) Tattooing.

(b) An *Administrative* rule violation will be heard by a disciplinary hearing officer. The inmate does not have the right to call witnesses, or to have an investigative employee assigned. As deemed necessary by the hearing officer, the inmate may be given staff assistance, as described in section 3318.

(c) The disciplinary hearing officer may find the inmate guilty if the facts support the charge, or may dismiss the matter if the facts do not support the charge. In addition, the disciplinary hearing officer

may find the inmate guilty of the charge but, in the interest of justice or because of other extenuating circumstances, dismiss the formal disciplinary charge and report the inmate's misbehavior on a CDC Form 128-A as a disciplinary counseling, as described in section 3312. If treated as a counseling, the rule violation report, CDC Form 115, will be disposed of as indicated in section 3326. When, in the fact-finding phase of an *Administrative* violation hearing, the violation is determined to be more serious than is appropriate for an *Administrative* violation hearing, the disciplinary hearing officer will terminate the *Administrative* violation hearing and have the matter rescheduled for a *Serious violation hearing.*

(d) If the inmate is found guilty of an *Administrative* violation, one or more of the following authorized dispositions may be made:

(1) Counseling, with or without a reprimand.

(2) Temporary suspension of privileges for a specific period of time not to exceed 30 days except as provided in section 3090.

(3) One or more weekend or holiday lockups not to exceed a total of 10 days; may not be imposed in addition to (5).

(4) Assignment to extra duty, not to exceed 40 hours.

(5) Confinement to quarters, for a period not to exceed five days.

(6) Placing a restriction on trust account withdrawals for canteen violations, or for violations involving the deliberate destruction, damage or misuse of state property when the inmate

refuses to pay for the cost of repair or replacement of such property, as described in section 3090.

(7) Suspension of all or part of any authorized disposition for a period not to exceed 90 days pending the inmate's acceptance and compliance with all specific conditions established for suspension of sentence.

(8) Invoke all or part of a currently suspended disposition for a previous violation when the finding of fact on the current violation also constitutes a finding of violation of the conditions established for the previously suspended sentence.

3334. *Isolation Diet.* Meals served to inmates undergoing isolation must supply approximately 2,500 calories per day.

(a) Either the regular menu of three meals per day less pastries and desserts or a planned menu consisting of two regular meals and a sandwich lunch will be served.

(b) Any inmate undergoing isolation who wastes food or fails in other ways to obey the rules for such inmates may be given a special isolation diet upon orders of the chief disciplinary officer or the disciplinary committee, subject to reporting and obtaining the director's approval not later than the next business day. Such diet will be served at least twice in each 24-hour period and will consist on each occasion of a sufficient quantity of the isolation diet formula, specified by the department, to supply approximately 2,500 calories per day.

3336. *Exercise Periods.* Each inmate undergoing confinement in an isolation or segregation cell will be allowed a limited daily exercise period outside his or her cell. Any inmate undergoing confinement in isolation or segregation who persists in dangerous or disruptive behavior or who fails to obey orders of the employee in charge of isolation or segregation may be temporarily deprived of this exercise period by the supervising custodial officer. The reason for such action will be recorded by the employee who makes the decision.

Inmate Classification Manual

Sec. 611. *Unit Operational Standards.* (a) Insofar as the physical plant allows, the security unit should be divided into small subunits so individuals with varying problems and program needs can be separated.

(b) The same general housekeeping practices in effect in the general population will apply to the security housing unit except for disturbed and destructive inmates who will be handled as the situation dictates. This includes regular clothing and bedding exchange.

(c) Inmates will be afforded the opportunity to shower not less than twice per week. Refusals to shower will be recorded on the inmate's CDC Form 114.

(d) Three meals per day will be served. Exceptions to this policy will be in accordance with the Director's Rules.

(e) Regular daily exercise will be provided. Failure to exercise and the reasons for such failure will be recorded on the inmate's CDC Form 114. Movement to or from a security housing unit under escort shall not be considered an exercise period. Work assignments may be considered an exercise period. Exercise is of importance in these units; it relieves boredom and reduces tension. Insofar as the physical plant allows, inmates should be allowed yard exercise periods if their adjustment, degree of self-control, and security housing status makes this privilege feasible. Refer to the Director's Rules for exceptions to this policy.

(f) No inmate will be maintained in a cell without bedding and/or clothing as punishment. The senior staff member on duty in the unit may remove items that might be destroyed or employed in a suicide attempt with the approval of the chief medical officer or his designated subordinate(s). A CDC Form 128-B will be prepared whenever an inmate is so housed, indicating the reasons for same. A copy of this CDC 128-B will be prepared when an inmate is removed from such housing and a copy forwarded to the warden/superintendent or his designated subordinate.

(g) Whenever assigned staff feels an inmate in the unit is a suicide risk, immediate referral will be made to the chief medical officer, staff psychiatrist, or a designated subordinate.

(h) Upon initially admitting an inmate to the unit, the staff member processing the admission will, based on a visual observation of the inmate, make a

notation in the security housing unit log concerning the apparent condition of health of the inmate.

(i) A representative of the medical department will visit each section of a security housing unit daily and see all inmates therein. At this time correctional personnel will bring all new arrivals to the attention of the medical department representative who will determine that their condition of health is not or will not be jeopardized by placement in security housing. Whenever it is determined that placement in retention in security housing will be detrimental to an inmate's physical or mental health, the inmate will be transferred to a secure room in the hospital.

(j) Mechanical restraint equipment will only be used in accordance with the Director's Rules.

(k) Inmates will be single celled in security housing units unless otherwise authorized by the Director.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-504

J. J. ENOMOTO, et al.,
Appellants
vs.
JAMES C. WRIGHT, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

QUESTION PRESENTED

Does California law, which sets forth specific criteria which must be met before a prisoner may be placed in segregated confinement, create a liberty interest which is protected by the Due Process Clause of the Fourteenth Amemdment?

STATUTE AND REGULATIONS INVOLVED

California Penal Code.

> Section 2600. "A person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights and only such rights as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public."

California Administrative Code, Title 15.

> Section 3330. "General Policy. (a) Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken."

California Department of Corrections, Inmate Classification Manual.

> Section 601. "Placement Criteria. (a) When an inmate cannot be main-

tained in a general population without proving to be a serious threat to the staff, other inmates, himself or the general welfare of the institution, assignment to a security housing unit should be made. Such an assignment is a serious last resort and should be made only after all other departmental and institution resources have proven ineffective or are clearly inapplicable.

* * * * *

Section 606. "Criteria for Security Housing Placement. The following criteria is a working guide when considering placement of inmates in security units. (a) The inmate presents a threat due to assaultive history or is aggressively acting out or threatening aggressive behavior. (b) The inmate presents an escape risk of unusual seriousness or persistence. (c) The inmate has requested and/or appears to require protective custody. (d) The safety and security of the institution will be threatened if the inmate is not placed in a restrictive setting."

THE NATURE OF THE CASE AND THE RECORD BELOW

In granting plaintiffs' motion for partial summary judgment, the three-judge District Court held that state prisoners have a liberty interest, protected by the Due Process Clause of the Fourteenth Amend-

ment, in not being placed in segregated confinement for "administrative" reasons without first being afforded certain procedural safeguards. This liberty interest was based upon two sources, the first being the Due Process Clause itself, and the second being the state's own administrative regulations. By this motion, appellees urge this Court to affirm the decision of the District Court on the second ground, since the court below was plainly correct in concluding that California's statewide regulations "define the circumstances under which an inmate may be confined in maximum security for administrative reasons." See Petitioners' Jurisdictional Statement (hereinafter "JS"), Appendix at 15. It is our submission that this question, which is essentially one of state law, is not substantial enough to warrant plenary consideration by this Court.

The record upon which the lower court's judgment was based consists essentially of (1) copies of the pertinent administrative regulations, (2) 50 affidavits and two depositions submitted by plaintiffs, and (3) two affidavits submitted by defendant Raymond K. Procunier, then Director of the California Department of Corrections (hereinafter the "CDC"). Subsequent to the court's entry of partial summary judgment, defendants submitted the affidavits of four prison wardens in support of defendants' motions for reconsideration and for a new trial pursuant to Rules 52 and 59, F.R.Civ.P. As the court below noted (see JS 6, 8, 12, 17), virtually all of plaintiffs' evidence was uncontroverted by defendants and the few factual allegations which are material to resolution of the instant motion to affirm are simply not in dispute. See Section II, infra.

Only four findings of fact were essential to support the judgment below on the state-created right rationale, and all four were supported by substantial evidence which was not controverted by defendants. Those facts are (1) that the conditions of confinement in segregation are significantly more onerous than those in the general population; (2) that prisoners are in practice confined in segregation for vague and subjective reasons and for lengthy periods of time; (3) that the classification hearings actually afforded prisoners are inadequate to insure reliable and fair decision-making; and (4) that the minimal protections ordered by the court below--which are those mandated in Wolff v. McDonnell, 418 U.S. 539 (1974)--are essential to protect the right at issue and will not jeopardize prison security. We briefly summarize the evidence on each of these four points prior to our discus-

sion of the applicable state law.

1. Conditions in Segregated Confinement [1/]

Prisoners in segregation are confined in small cells for 23 or more hours per day (Pl. Ex. 4,7,25). These cells are filthy, and are infested with vermin, roaches and rats (id., 1,4,7). Often the cell area stinks (id., 1,7,8). Because prisoners can communicate with each other only by shouting between cells, the noise level is frequently intense (id., 1,8,14,19). Prisoners must eat in their cells, get limited exercise, and cannot freely participate in vocational or educational programs (id., 2, 4,6). They wear shackles during visits with family and friends, a practice which

[1/] References in this subsection to particular affidavits are for illustrative purposes only; in most instances, numerous other affidavits also document the same particular condition.

is so painful that in some cases the visits have ceased altogether (id., 8,10, 12,14,19). Prisoners in segregation have been subject to beatings and frequent tear gassing by guards (id., 9,12,14,15). The likelihood that a prisoner will be released on parole while he is confined in segregation is greatly diminished (id., 30,31,34; Deposition of Huel Morphis, pp. 44-45). And expert psychiatric testimony was to the effect that such confinement

> "may cause permanent psychological, if not, indeed, physical damage. If prolonged, it may even destroy the capacity of prisoners to lead a normal life after release." JS, Appendix at 7 n.4 (opinion below); see Pl. Ex. 48,53.

These facts, which remain uncontroverted even if defendants' evidence is viewed most indulgently, are more than sufficient to show that segregated confinement imposes such severe consequences that by no stretch of the imagination could a

prisoner's right to remain free of them be termed de minimis. Compare Goss v. Lopez, 419 U.S. 565 (1975) (10 day suspension from public school); Bell v. Burson, 402 U.S. 535 (1971) (loss of driver's license).

2. Reasons for and Length of Segregated Confinement

Segregated confinement is authorized when a prisoner presents a threat to himself, to other inmates or to staff. See Section I, infra. Yet the specific reasons assigned by prison officials to justify such decisions are inordinately vague and subjective. For example, the record shows that inmates have been segregated for suspected "association" with particular inmates or inmate groups (e.g., Pl. Ex. 29, 32,37); for being "militant" (id.,.8,19); for "arrogance" (id., 10); for a "bad attitude" (id., 56); for being "disruptive" (id., 11); for "institutional convenience"

(id., 26); for being a "trouble maker" (id., 33) or "dangerous" (id., 38,43), or a "threat to staff" (id., 40). In some cases, such charges were prosecuted "administratively" after a District Attorney had refused to prosecute those charges criminally, and/or a prison disciplinary committee had refused to convict on them (id., 2,10,14,21,30,31,41). And some prisoners professed to have no idea why they were in segregation (id., 20,22). Most did not know when they would be released from segregation, and many complained that they did not know what, if anything, they could do to obtain their release (id., 30-32). Unlike "disciplinary" segregation, which is limited to 10 days, "administrative" segregation can continue for long periods of time--for months and even years--and at least eleven of plaintiffs' affiants had spent more than a year in segregation at the

time they executed their affidavits (see id., 2,3,5,11,20,21,22,24,25,30,34.

3. The CDC's Procedures for Ordering Segregated Confinement

Most of the 46 inmate affiants described in detail the "vargaries and irregularities of defendants' practices" in placing prisoners in segregation. JS, Appendix at 8 (opinion below). Virtually every affidavit discloses, as do the four summarized by the court below (JS, Appendix at 8-11), the perfunctory and pointless nature of these "hearings", and the pervasive failure of defendants to give timely notice or adequate reasons for segregation decisions. Not a single one of these affidavits was controverted by defendants, who were content to submit a description by defendant Procunier of what the appropriate classification regulations required.

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4. The Procedures Mandated by the Court Below are Essential and Reasonable

The procedures ordered into effect by the court below are those set forth by this Court in Wolff v. McDonnell, supra. Based upon the arbitrary practices documented in the record, the court below properly found that "[t]hese minimal protections are essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the security of the institution and thereby to avoid subjection to the severe deprivations of confinement in maximum security." JS, Appendix at 16, 17 (opinion below). As the District Court noted, defendants "made no showing that prison administration or safety will be jeopardized if defendants are required to accord plaintiffs at least the minimum protections called for by Wolff in the case of disciplinary sanctions." JS, Appendix at 16.

To the contrary, defendant Procunier's affidavit asserted that even prior to Wolff the CDC's disciplinary regulations "were interpreted in a manner which met the requirements of Wolff." Affidavit of Raymond K. Procunier, dated September 24, 1974 (hereinafter the "Procunier Affidavit") at 5. And plaintiffs' "expert testimony--not controverted--indicate[ed] that implementation of fair procedures decreases tensions in prisons and eases the work of prison administrators." JS, Appendix at 17 (opinion below).

ARGUMENT

One of the two grounds upon which the District Court placed its decision involved its interpretation of state regulations, and it is upon this ground that appellees base the instant motion to affirm. In our view, this question not only was correctly decided below, but is so unsubstantial as not to warrant further argument in this Court. Also insubstantial--and indeed specious, in light of the record below--is appellants' claim that the material facts upon which the District Court's judgment was based were controverted within the meaning of Rule 56, F.R.Civ.P. We therefore urge this Court to affirm the judgment of the District Court on the state law ground, thereby making it unnecessary to reach the larger constitutional question tendered by appellants in their Jurisdictional Statement. 2/

2/ Defendants have also appealed from the decision below denying their motion for reconsideration under Rules 52(b) and 59, F.R.Civ.P. Such motions, which are addressed to the trial court's discretion, see 6A Moore, Federal Practice ¶59.07 at p. 59-99, are not designed to permit relitigation of old matters, but to correct manifest error or present newly discovered evidence. See Moore, Federal Practice, supra; Wright & Miller, Federal Practice & Procedure, §§2582, 2805. Such motions cannot be used, as appellants have here attempted, to obtain a rehearing of the merits merely because counsel failed to present their strongest case at the original hearing. See, e.g.,

I

CALIFORNIA LAW AFFORDS A STATE PRISONER THE RIGHT NOT TO BE PLACED IN SEGREGATED CONFINEMENT UNLESS HE POSES A THREAT TO HIMSELF OR TO OTHERS, A RIGHT WHICH IS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Recent decisions of this Court hold that where state law has created a property or liberty interest a person may not be deprived of it in violation of the Due Process Clause. Goss v. Lopez, 419 U.S. 565 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Perry v. Sindermann, 408 U.S. 593 (1972). This rule, which applies to all State created rights except those of a de minimis nature, Goss v. Lopez, supra, applies to prisoners as well as to ordinary citizens. Wolff v. McDonnell, supra; see Meachum v. Fano, 427 U.S. 215 (1976); Montayne v. Haymes, 427 U.S. 236 (1976).

Minneapolis-Honeywell Regulator Co. v. Midwestern Instruments, Inc., 188 F. Supp. 248 (N.D. Ill. 1960), aff'd, 298 F.2d 36 (7th Cir. 1961); Moore, Federal Practice, supra. Since none of the grounds for amendment of findings or for a new trial was present in this case, the District Court clearly did not abuse its discretion in denying appellants' motions under Rules 52(b) and 59.

This Court has also identified two basic ways in which states may create a property or liberty interest. The first is "by statute, by rule or regulation, or by interpretation of their own constitutions." Meachum v. Fano, supra, 427 U.S. at 229; accord: Goss v. Lopez, supra. The second is through a "mutually explicit understanding," whereby a course of conduct, over time, gives rise to a protected right if it creates a reasonable expectation or a "common law" within a particular institution. Perry v. Sindermann, supra, 408 U.S. at 601; cf. Meachum v. Fano, supra, 427 U.S. at 216 (referring to "state law or practice"). Thus in withholding due process rights with respect to inter-prison transfers, this Court held that a Massachusetts prisoner

had "no right to remain at any particular prison and no justifiable expectation that he would not be transferred unless found guilty of misconduct." Montayne v. Haymes, supra, 427 U.S. at 243 (emphasis supplied).

In California, however, prisoners do possess a state-created right not to be placed in segregated confinement "except for misbehavior or upon the occurrence of other specified events." Id. at 242. This right rests upon both state regulations and past prison practices which reflect a common law within that institution. It also rests upon the basic policy which the California legislature expressed when, in 1975, it amended Section 2600 of the Penal Code to provide that a state prisoner may "be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined***." Cf. Joy v. Daniels, 479

F.2d 1236 (4th Cir. 1973).

Looking first to the regulations, the court below found Section 3330 of the California Administrative Code to "define the circumstances under which an inmate may be confined in maximum security for administrative reasons." JS, Appendix at 15. That section provides that inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons; that they must be segregated when it is reasonably believed that they are a menace to themselves or others or a threat to the security of the institution; and that clearly documented reasons must be given at the time such action is taken. Ibid. "Thus, the inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum security segregation unless he is found, for clearly documented reasons, to come within the

standard set by the rules." Id. at 16.

There is, moreover, additional support in the record for the ruling of the District Court. For in addition to Section 3330, supra, Sections 601(a) and 606 of the CDC Classification Manual set forth specific criteria which prison officials must observe in placing a prisoner in segregated confinement. [3] Thus Section 601(a) provides that a prisoner is to be segregated if he is "a serious threat to staff, other inmates, himself, or the general welfare of the institution." As the then Director of the Department of Corrections put it:

> "An inmate may be placed in a security housing unit only when he cannot be maintained in a general population without posing a serious threat to staff, other inmates, himself, or the general welfare of the institution. Such placement is a serious last resort and should be made only after all other departmental and institutional resources have proven ineffective or are clearly inapplicable." Procunier Affidavit, supra, at 1-2 (emphasis added).

Since it is elementary that an agency must adhere to its own regulations, see Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co., 284 U.S. 370 (1932), it follows that a prisoner may be segregated only if it is reasonable to believe that he meets one or more of these criteria.

Furthermore, California has acknowledged that "involuntary assignment to a security housing unit by a classification committee" is an action having a "substantially adverse effect" on the conditions of a prisoner's confinement, and has adopted certain "fairness procedures" to be

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[3] See pages 2-3, supra. According to the Director of the CDC, "[t]he procedures in this manual are regulations and administrative orders which are to be applied in every institution in the California Department of Corrections and so are of statewide application." Procunier Affidavit, at 1. See also, Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968).

followed before such a decision can be made. CDC Classification Manual, supra, Sections 405, 406. [4] It has also made such decisions subject to its inmate appeals procedure, thereby affording prisoners the right to contest such decisions through administrative channels. Procunier Affidavit, supra, at 4-5. It is difficult to imagine how an inmate can "prepare a defense against the proposed [classification] action," Classification

[4] In initially promulgating these regulations, the CDC stated that its purpose was "to increase the fairness and validity of classification actions where the action under consideration may have a substantial adverse impact upon the inmate in question." See Defendants' Supplemental Opposition to Motion for Partial Summary Judgement, Exhibit A. Thus it is clear that, contrary to appellants' claim (see JS at 15), prisoners as well as prison staff members are intended beneficiaries of these and related regulations involving transfers to segregated confinement. Such a factor militates in favor of finding a state created right in favor of a person who is intended to be benefited thereby. See, e.g., Camico v. Secretary of House & Urb. Dev., 509 F.2d 694, 700 (2d Cir. 1974).

Manual, supra, Section 405(c), or submit a meaningful appeal from such an action, unless he can base such a defense or appeal upon a right not to be segregated unless one or more of the foregoing criteria exists. Although we do not contend that the mere presence of some procedural protections denotes the existence of a property right, "procedural protections may be persuasive, for they suggest that there are factual issues which matter." Suckle v. Madison General Hospital, 499 F.2d 1364, 1366 (7th Cir. 1974).

Finally, the record in this case shows that, in fact, inmates are segregated for the reasons set forth in the regulations and the Procunier Affidavit. See Plaintiffs' Motion for Partial Summary Judgment and Preliminary Injunction, Exhibits 1-45. Although we have already noted that these reasons can be exceedingly vague and subjective, it is plain that they all do, in

fact, pertain to the safety of inmates or staff, and the general security of the institution. Rudimentary classification hearings or "meetings" are almost always held, and the affidavits filed by plaintiffs show that inmates have quite justifiably come to expect that they will remain in the general population unless prison officials conclude that they do pose a threat to the safety of other inmates or staff. [5/]

[5/] Certainly the result in this case should not turn on the discredited notion that fewer procedural protections (or none at all) ought to be accorded a prisoner who is segregated for "administrative" rather than for "disciplinary" reasons. See JS at 7,16. The better reasoned of the opinions which have discussed this point have concluded that, for due process purposes, there is no meaningful distinction between the two, since the effect upon the prisoner is generally the same. See, e.g., Carlo v. Gunter, 520 F.2d 1293, 1295-96 (1st Cir. 1975); Allen v. Nelson, 354 F.Supp. 505, 511 (N.D. Cal.), aff'd. 484 F.2d 960 (9th Cir. 1973); Landman v. Royster, 333 F. Supp. 621, 645 (E.D.Va. 1971); Gray v. Creamer, 465 F.2d 179 (3rd Cir. 1972). In point of fact, the record below plainly shows that prisoners segregated for "administrative" reasons are confined (1) for acts which are far more vague and (2) for periods of time which are much longer than is the case where "disciplinary" segregation is concerned, and therefore more procedural protection, not less, should attend determinations involving administrative segregation in California. See JS, Appendix at 17-18 (opinion below).

Since the District Court's reading of the state regulation is at the very least a "tenable" one, we submit that this Court should not disturb it on appeal. See Bishop v. Wood, 426 U.S. 341 (1976). In Bishop, where due process protection for an alleged state created right was also at issue, this Court held that a reading of state law by a locally experienced District Judge, deriving some support from a state court decision and accepted by the court of appeal was sufficient to "foreclose [this Court's] independent examination of the state-law issue." Id., at 347 (emphasis supplied). See also, Runyon v. McCrary, 427 U.S. 160, 181 (1976). Therefore the short answer to

the instant appeal is that an interpretation of California law by the three experienced Federal judges who sit in California does not warrant further argument in this Court. 6/

6/ In considering what process is due, the District Court rejected several of the safeguards proposed by plaintiffs, and instead limited its order to those required by this Court in Wolff v. McDonnell, 418 U.S. 539 (1974). That, we submit, was a modest and reasoned response, especially in light of (1) the highly arbitrary and meaningless classification "hearings" heretofore given by appellants, as shown by the record below, (2) the court's conclusion that "[t]he deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge," and (3) the uncontroverted evidence that Wolff safeguards would be reasonable and even beneficial to the prison system. And although appellants' counsel now contend that the "District Court's ruling substantially impairs the discretionary powers of the State to administer its prison system" (JS at 12), the Director of the CDC testified that in disciplinary matters the Department was in compliance with Wolff even before Wolff came down.

The other answer is that, as we have shown, the lower court's determination of state law was plainly correct. And, once the District Court found that prisoners possess a state created right not to be segregated unless they pose a threat to themselves or to others, its judgment merely followed and applied settled decisions of this Court. For neither Meachum nor Montayne disturbed the holding in Wolff that such rights are protected by the Due Process Clause, and thus the holding of the court below was hardly "contrary" to those cases, as appellants claimed. 7/

7/ We believe that the lower court was also correct in finding a Fourteenth Amendment liberty right not to be segregated without good cause where, as here, (1) the conditions of confinement are so harsh and (2) such confinement substantially diminishes the likelihood of release on parole. However, we do not contend that that question is "unsubstantial" within the meaning of Rule 16 of this Court, and we therefore base the instant motion to affirm on the existence of a state created right.

II

THE MATERIAL FACTS UPON WHICH THE LOWER COURT'S DECISION IS BASED WERE UNCONTROVERTED BY DEFENDANTS

In support of their motion for summary judgment, appellees submitted 46 detailed affidavits executed by the named plaintiffs and members of their class, and also affidavits from expert penologists John Boone and David Fogel and psychiatrists Bernard L. Diamond and Frank Rundle. These affidavits described, at great length and in painful detail, (1) the reasons which were in fact given by the prison officials for placing these prisoners in segregation, (2) the type of notice, hearing, and decision which they in fact received, and (3) the conditions to which they were in fact subjected while in segregation. Appellants, however, did not even attempt to controvert a

single allegation in any of these affidavits. Instead, they merely submitted two affidavits executed by the then Director of Corrections, Raymond K. Procunier, which basically reviewed the pertinent provisions of the Department's Classification Manual (never disputed by plaintiffs), as well as certain conditions of confinement that were said to exist in the four segregation units in question. That was it. Only after judgment was rendered against them did appellants file four brief affidavits -- couched in virtually identical language, and signed by the wardens of the four institutions -- addressing themselves to certain conditions in the lockup units; stating that the Classification Manual procedures were being observed; and asserting that "parole considera-

tions are not denied to inmates on the basis that they are confined in a segregated housing unit."

Now, in a remarkable display of legal chutzpah, appellants claim that since the facts upon which the lower court's opinion was based were "controverted" within the meaning of Rule 56, F.R.Civ.P., summary judgment was improper. Such a contention, however, cannot withstand serious scrutiny for the following reasons.

Initially, we note that the set of four (virtually identical) affidavits by the wardens was not filed prior to judgment, but only in support of appellants' Rule 52/59 motions for reconsideration. As such, they were plainly untimely. See, e.g., Englehard Industries, Inc. v. Research Instrumental Corporation, 324 F.2d 347, 352 (9th Cir. 1963); cf. Sound Ship Building

Corp. v. Bethlehem Steel Co., (Inc.), 533 F.2d 96, 101 n. 3 (3d Cir. 1976), and authorities cited. Appellants offered no reason to explain why the affidavits could not have been submitted at some time during the two and one-half years prior to judgment, nor did they ever file a Rule 56(f) affidavit. In fact, the affidavits show on their face that they easily could have been filed at any time prior to the court's ruling on plaintiffs' motion for partial summary judgment. Nor did the affidavits purport to contain recent or newly discovered evidence. Therefore to permit such a belated showing would be to allow a party resisting summary judgment to simply hold back his evidence, see how the judgment goes, and then (if he loses) make a post-judgment

evidentiary showing that the court would have to honor.

Next, we note that both the Procunier affidavit and those of the wardens are written in terms of what the administrative procedures require, followed by conclusory allegations that some of those regulations are being followed. But the whole purpose of Rule 56 is to prevent a party opposing summary judgment from resting upon his pleadings and from opposing a specific, factual showing of the moving party with conclusory denials. Hence Rule 56(e) requires an opposing party's evidentiary showing to be factual and first-hand, rather than conclusory, in nature.[8/] None of appellants' six

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8. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

affidavits even begins to pass this test. See, e.g., Antonio v. Barnes, 464 F.2d 584, 585 (4th Cir. 1972); 10 Wright & Miller, Federal Practice & Procedure, §2738 at 695-96.

However, even if all six affidavits are given full consideration, the material facts upon which the judgment below is based are still supported by uncontroverted evidence. A close comparison of the allegations

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evidence, and shall show affirmatively that the affiant is competent to testify to matters stated therein. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e), F.R.Civ.P.

in appellees' 50 affidavits with those of appellants' six readily discloses that most of appellees' specific allegations are nowhere disputed by defendants, even in conclusory terms. So far as classification procedures are concerned, defendant Procunier simply describes what existing procedures require; and the four wardens simply swear that existing procedures are being followed. But plaintiffs' affidavits state with specificity what in fact happened to them when they were put into segregated confinement. They show, as the court below observed (see, e.g., JS, Appendix at 11), that in fact many inmates were not given adequate notice or a written decision; and that for many if not most their classification "hearings" were brief, point-

less affairs at which the prisoner could do no more than "make an unsupported denial of the charges against him." Ibid.[9/] Surely a party cannot successfully avoid summary judgment, in a situation where nearly 50 affidavits document in detail the moving parties' claim of irregularity, by filing a conclusory affidavit that proper procedures are being followed. Rule 56(e), F.R.Civ.P. Such a result would in substance, be no different

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9. Appellants also imply that there is no evidence to show that appellants' "amended" classification procedures--requiring notice, a hearing, and a written decision--had been violated. JS at 19. But a reading of the Procunier Affidavit (¶¶ 5-7, 10), shows that at the time plaintiffs' affidavits were executed the Classification Manual already required that such rights be afforded. Yet appellants never even attempted to controvert appellees' extensive and detailed showing, contained in more than 45 affidavits, that the requests were in practice being commonly ignored.

than the old Third Circuit rule allowing a party opposing summary judgment to rest on its pleadings, which Rule 56 was amended to overrule.[10]

So far as conditions of segregated confinement are concerned, there are many very specific allegations that none of defendants' six affidavits even touched upon. For example, allegations that cells are filthy and vermin infested, that there is a pervasive stench and a terrible noise level, and that prisoners undergo visiting in shackles, as well as others of a similar nature, are entirely unrefuted, even in conclusory terms. And the detailed, serious allegations of severe psychological harm--testified to by two distinguished psychiatrists--

10. See Advisory Committee Note to the 1963 Amendment of Rule 56(e), reprinted at 31 F.R.D. 587, 648-49.

stand entirely uncontroverted.

In any event, the only relevance of this testimony for purposes of the instant motion to affirm is that since the conditions in segregation are so severe, a prisoner's right not to be placed there cannot be considered de minimis. Surely that fact is amply documented by the whole of the record in this case, even if the six affidavits submitted by appellants are given the credence which, due to their untimely and conclusory nature, they do not deserve.

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CONCLUSION

The holding of the three-judge District Court--that California law gives state prisoners a right not to be placed in segregated confinement unless they pose a threat to themselves or to others--is plainly correct, and the substantial facts upon which that holding is based are uncontroverted within the meaning of Rule 56. We therefore respectfully submit that appellants present no substantial question for decision by the Court, and that the judgment and decree of the District Court should be affirmed.

October 31, 1977.

Respectfully submitted,

B. E. BERGESEN, III
Counsel for Appellees

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-504

J. J. ENOMOTO, et al.,
Appellants,

vs.

JAMES C. WRIGHT, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

RESPONSE TO APPELLEES' MOTION TO AFFIRM

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PRELIMINARY STATEMENT

This response to appellees' motion to affirm is filed pursuant to Rule 16, par. 4, of the Supreme Court Rules.

ARGUMENT

APPELLEES HAVE NO INTEREST FEDERALLY PROTECTED IN NOT BEING PLACED IN SECURITY HOUSING UNITS FOR ADMINISTRATIVE REASONS.

In their motion to affirm, the appellees assert that the district court properly held that California state

prisoners have a liberty interest, protected by the due process clause of the Fourteenth Amendment, in not being placed in segregated confinement for administrative reasons without first being afforded certain procedural due process rights. The appellees assert that this liberty interest has two sources. The first source, according to appellees, is the due process clause of the Fourteenth Amendment. The second source, they contend, is California law. Motion to Affirm, 4. As shown in appellants' Jurisdictional Statement, the appellees are plainly in error.

Clearly the due process clause of the Fourteenth Amendment does not in itself confer any right upon a California prison inmate not to be placed in a security housing unit for safety and administrative reasons. *Montayne v. Haymes,* 427 U.S. 236 (1976); *Meachum v. Fano,* 427 U.S. 215 (1976). This Court has specifically ruled that, absent a state conferred right, a transfer of an inmate to more onerous confinement as a result of an administrative decision does not bring the due process clause into play. *Montayne v. Haymes, supra* at 241-243; *Meachum v. Fano, supra* at 223-229.

Thus it is only to be expected that appellees would look to California law in their attempt to assert a liberty interest in their classification status. They look in vain to California statutes, for those provisions governing administrative classification, placement and transfer of prisoners (Cal. Pen. Code §§ 5068, 5080) like their federal counterpart in Title 18, United States Code section 4081, confer "no legitimate statutory or constitutional entitlement sufficient to invoke due process." *Moody v. Daggett,* 429 U.S. 78, 88 n.9 (1976).

Appellants argue that California Penal Code section 2600, which provides in substance that a state prisoner may be deprived only of such rights as may be necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public, creates a state-given right not to be placed in segregated confinement. However, Penal Code section 2600, a general statute, in no way deals with classification of prisoners; this specific subject is covered by Penal Code sections 5068 and 5080.

Neither can appellees base a state-given right in California's administrative regulations. Title 15, California Administrative Code section 3330 provides for administrative segregation when it is reasonably believed that a prisoner is a menace to himself and others or a threat to the security of the institution. A determination that an inmate should be segregated under this provision necessarily involves wide administrative discretion.

Neither this administrative regulation, nor any other provision of California law, conditions transfers to security housing units "on proof of serious misconduct or the occurrence of other events." *Meachum v. Fano, supra,* 427 U.S. at 216. As explained in appellants' Jurisdictional Statement at page 16, the decision to place a prisoner in segregation does not require a finding of misconduct; it can be made for a

broad range of reasons, including protection of the prisoner himself. It is by its very nature discretionary.

Appellees nevertheless contend that the lower court correctly construed Title 15, California Administrative Code section 3330 as conferring a liberty interest. But this Court has held that it is for state officials, not federal courts, to construe and interpret state regulations. *Wood v. Strickland,* 420 U.S. 308, 325-326 (1975). Appellants submit that the district court "was ill-advised" to substitute its interpretation of California regulations for the understanding of those officials who adopted the regulations and are entrusted with their enforcement. *Wood v. Strickland, supra* at 325.

CONCLUSION

For the reasons set forth herein and for the reasons set forth in the Jurisdictional Statement, the appellants respectfully submit that jurisdiction in this case should be noted.[1]

Dated, November 21, 1977.

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[1]Argument II of appellees' motion to affirm is surplusage. In essence, the appellants are attempting to argue, as they did in the district court, Eighth Amendment claims of cruel and unusual punishment in the guise of invoking Fourteenth Amendment Due Process claims. The Eighth Amendment is not in issue here. That issue remains to be tried.